Nos. 78-83 and 78-84

In the Supreme Court of the United States

OCTOBER TERM, 1978

TIMKEN COMPANY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

CLEVELAND ELECTRIC ILLUMINATING CO., ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (No. 78-83, Pet. App. 1a-49a; No. 78-84, Pet. App. 19-70) is reported at 572 F.2d 1150.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1978. A petition for rehearing was denied on April 18, 1978. The petitions for a writ of certiorari were filed on July 14 and 15, 1978 respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner had adequate notice and opportunity to comment on EPA's pollution control plan (No. 78-83).
2. Whether the court of appeals adequately reviewed the plan (Nos. 78-83 and 78-84).
3. Whether the record adequately supports the technological and economic feasibility of the plan (Nos. 78-83 and 78-84).
4. Whether the plan fails to set forth technical means for compliance (No. 78-84).

STATEMENT

In the Clean Air Amendments of 1970, 84 Stat. 1676, 42 U.S.C. 1857 *et seq.*,[1] Congress directed each

[1] The Clean Air Act (formerly 42 U.S.C. 1857 *et seq.*) is now 42 U.S.C. 7401 *et seq.* See Clean Air Act Amendments of 1977, Pub.L. 95-95, 91 Stat. 685.

state to establish a plan for the control of air pollution by 1972. See *Train* v. *Natural Resources Defense Council*, 421 U.S. 60. The State of Ohio, however, failed to develop a plan for the control of sulfur dioxide pollution and, accordingly, as required by Section 110(c), 42 U.S.C. 7410(c), EPA published its proposed plan on November 10, 1975 (40 Fed. Reg. 52410). At the same time it released for public review and comment a two-volume technical support document of approximately 900 pages, setting forth the scientific basis and rationale for the proposed plan. EPA then held five days of public hearings in four cities in Ohio, and solicited written comments on the proposed plan until January 23, 1976. In all, more than 230 comments and associated exhibits were submitted, resulting in an administrative record of several thousand pages.

As a result of these comments and others presented at the public hearings, EPA modified the method of determining emission limitations for pollution sources in most urban areas in Ohio. Specifically, EPA used the Real-Time Air-Quality Simulation Model ("RAM"), a mathematical computer model which simulates the complex atmospheric dispersion of a pollutant from urban sources and predicts resultant ground level concentrations of the pollutant. Prior models were unable to evaluate more than one source at a time; RAM thus represented a significant advance in analyzing urban pollution problems. On August 27, 1976, the Administrator promulgated the control plan for sulfur dioxide emissions (41 Fed.

Reg. 36324) and released a second technical support document of approximately 1,260 pages, which evaluated the comments and explained the changes made in the plan in response to comments.

Petitioners and others sought judicial review of the plan in the court of appeals under Section 307(b)(1), 42 U.S.C. 7607(b)(1). On November 14, 1976, after a hearing and upon consideration of motions for stay of enforcement of the plan, the court *sua sponte* ordered that the administrative record be opened and that those seeking review be allowed 60 days to comment on the plan as promulgated. See Pet. App. 7a, 8a-9a.[2]

The court's order precluded the submission of "any new emission, process or air quality data" (Pet. App. 8a).* This limitation was not intended to, nor did it, prevent any petitioner from submitting comments on EPA's decision to use the RAM model or on the scientific rationale underlying the model, or from suggesting modifications to the model. Indeed, the consulting firm retained by petitioners Timken and Cleveland Electric Illuminating Company submitted an extensive evaluation of the RAM model, criticizing the model itself and EPA's procedures in using the model, and recommending that EPA modify the model in several fundamental respects. The firm submitted three separate analyses, each approximately 175 pages long, on the use of the RAM model in Stark, Lucas,

[2] "Pet. App." refers to the appendix to the petition in No. 78-83.

and Summit Counties.[3] In response, EPA reran the computer analysis for those three counties. EPA adhered to its plan and to the RAM model, with some modifications. See *EPA Supplemental Technical Support Document: Sulfur Dioxide Control Strategy for the State of Ohio*, May 1977. Petitioners again sought judicial review.

The court of appeals affirmed EPA's plan as a "rational choice" made "well within the [agency's] discretion" and specifically upheld EPA's decision to use the RAM model (Pet. App. 28a). The court of appeals held that "[o]ur standard of review of the actions of United States EPA is whether or not the action of the agency is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' Clean Air Act Amendments of 1977, Pub.L. No. 95-95, § 305(a), 91 Stat. 775 * * *. Thus, we are required to affirm if there is a rational basis for the agency action and we are not 'empowered to substitute [our] judgment for that of the agency.' *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971)" (Pet. App. 21a.) It found that, under this standard, EPA's plan, and specifically its use of RAM, was rational, neither arbitrary nor capricious, and within the agency's discretion (Pet. App. 28a). The court also rejected petitioners' "[s]omewhat halfhearted" argument that the plan was economically and technologically infeasible (Pet. App. 29a). In ad-

[3] See Appendix to the Joint Brief Relative to the Use of the RAM Model for excerpts from the analyses, A-47 through A-333.

dition, the court rejected petitioners' claim to a right of cross-examination of EPA personnel. It held that the notice and comment rulemaking procedures followed by EPA and supplemented with the court-ordered additional comment opportunity met the requirements of the Clean Air Act, the Administrative Procedure Act, and due process, and that there was neither a legal nor practical need for any more hearings (Pet. App. 18a). The court also dismissed the argument, raised by the utility petitioners for the first time in their reply brief, that the plan was defective because the variability of sulfur in coal had not been adequately taken into account. Finally, the court outlined a procedure for resolving the remaining data disputes that exist between EPA and petitioners if such disputes are not resolved by the parties.[4]

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or other courts of appeals, and does not warrant further review.

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[4] On June 29, 1978, the court of appeals issued a second decision, this one concerning the emission limitations set for sources in rural areas of Ohio (No. 78-84, Pet. App. 220). The court found that EPA had lacked a sufficient rational basis for the mathematical assumptions used in a model for predicting pollution concentrations in unstable weather conditions, and it remanded the issue to EPA for further consideration (*id.* at 228.) The court also issued several orders regarding other outstanding issues. That decision is not before this Court.

1. In No. 78-83, petitioner Timken argues (Pet. 10-21) that the notice and comment opportunities did not allow "any real opportunity for specifically affected parties to comment upon the [RAM] model's particularized impact" (Pet. 12). This assertion appears to rest on Timken's belief that the RAM model is so "revolutionary" (Pet. 14) and of such precedential importance that something more than notice and comment procedures should have been followed. That argument, however, is contrary to the facts.

The procedures followed in this rulemaking resulted in a thorough scientific dialogue between EPA experts and industry experts. EPA developed and released detailed and sophisticated technical support documents in response to comments submitted by interested parties. As the court noted, EPA adopted the RAM model in response to industry criticism that "the plan then under consideration did not determine limitations by individual stacks to a sufficient degree" (Pet. App. 19a). Furthermore, the use of models to set emission limitations is not an unprecedented or unexpected maneuver. The courts of appeals have consistently upheld the use of models after notice and comment procedures. See *Texas* v. *Environmental Protection Agency*, 499 F.2d 289, 297-301 (C.A. 5), certiorari denied, 427 U.S. 905; *South Terminal Corp.* v. *Environmental Protection Agency*, 504 F.2d 646, 662-663 (C.A. 1); *Kennecott Copper Corp.* v. *Train*, 526 F.2d 1149, 1152, n. 16 (C.A. 9), certiorari denied, 425 U.S. 935; *Sierra Club* v. *Environmental Protection Agency*, 540 F.2d 1114, 1136 (C.A. D.C.),

remanded on other grounds, *sub nom. Montana Power Co.* v. *E.P.A.*, 434 U.S. 809. Moreover, in the 1977 Amendments to the Clean Air Act, Congress specifically approved such models and directed EPA to use them in individual cases, through legislative-type rulemaking. Section 165(e)(3), 42 U.S.C. 7475(e)(3). See also Section 320(d), 42 U.S.C. 7620(d). There is nothing about the application of the RAM model in Ohio that requires hearing procedures more elaborate than Congress requires for the application of other models.

The most serious shortcoming in Timken's argument, however, is that it virtually ignores the fact that, at the court of appeals' order, Timken and other polluters were given the opportunity to comment on the RAM model and its application in this case. Thus Timken had a full opportunity to challenge the use of the model and its application to Timken, and took advantage of that opportunity by submitting detailed comments and criticisms.

As the court of appeals properly concluded, "[I]f there was a legitimate due process complaint arising from the fact that petitioners had not had a chance to comment upon the RAM model as employed by [the] United States EPA in its Ohio SO_2 control plan, we believe it was surely cured by this court's remand for reopening of the administrative record and United States EPA's reconsideration thereafter" (Pet. App. 17a).

Timken now argues that "the reviewing court must insist that EPA construct a procedure which insures

the reliability of technical decisions" (Pet. 13) and that due process requires that "source specific input data must be tested against actual conditions * * *" (Pet. 19.) These contentions are at bottom expressions of Timken's displeasure with the plan adopted by EPA. The court of appeals correctly rejected these arguments: "Petitioners have had ample opportunities to present their views to the agency. A full record has been written. There has already been an inordinate delay of five years longer than Congress contemplated" (Pet. App. 18a).

2. Petitioners Timken (Pet. 22-28) and the utilities (No. 78-84, Pet. 12-15) contend that the court failed to apply the standard for judicial review established by this Court in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, because it allegedly failed to give "searching inquiry" (Pet. 22) to the alleged "failings of the RAM model" (Pet. 25). This contention is simply incorrect. The court of appeals discussed the RAM model at length (Pet. App. 18a-28a) and concluded that RAM, if not perfect, was better than anything else now available (Pet. App. 25a). Petitioners now assert that this conclusion was irrelevant, given RAM's alleged defects (Pet. 24). The Clean Air Act, however, does not require perfection,[5] nor, as the court noted, is

[5] Section 110, 42 U.S.C. 7410, requires that control plans be promulgated to "insure" that the national standards are attained. Accordingly, the plans promulgated throughout the rest of the country to meet the 1972 deadline of the Act were developed with whatever analytical tools were available. Moreover, the courts of appeals have consistently recognized that

there even technology available to meet such a level of proof (Pet. App. 26a). Therefore, applying the standard of *Overton Park* to promulgation of a control plan under the Clean Air Act requires only that EPA rationally select a method of setting emission limitations. EPA's decision to use the RAM model to develop the control plan for urban areas in Ohio meets that test and was properly affirmed by the court (Pet. App. 21a, 28a).

The irony of petitioners' present position is that the form of computer dispersion modeling selected for developing the Ohio plan was urged upon EPA, during the period for comments on EPA's original plan for urban Ohio sulfur dioxide pollution, by industry rep-

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EPA must resort to less than perfect tools to meet congressional deadlines. In *Texas* v. *Environmental Protection Agency, supra,* the Fifth Circuit affirmed EPA's use of an admittedly "unreliable" model to set oxidant pollution emission limitations, 499 F.2d at 301. Similarly, the First and Ninth Circuits have upheld the use of imperfect models. *South Terminal Corp., supra,* 504 F.2d at 662-663; *Kennecott Copper Corp., supra,* 526 F.2d at 1152, n. 16. In *Sierra Club* v. *Environmental Protection Agency, supra,* 540 F.2d at 1136, the court upheld the use of computer dispersion modeling as a rational method for evaluating proposed new pollution sources and stated that "lack of precision alone" would not defeat the approach. The First Circuit upheld EPA's approval of the loosening of emission limitations for several sources which had originally been set with a rollback model based upon the results of a dispersion model analysis. *Mision Industrial, Inc.* v. *Environmental Protection Agency,* 547 F.2d 123, 129 (C.A. 1). EPA must satisfy "judicial insistence on greater reliability." *Texas* v. *Environmental Protection Agency, supra,* 499 F.2d at 301. The development of the RAM model responds to this call.

resentatives who "strenuously objected" to the use of less sophisticated models (Pet. App. 21a-22a). Petitioners' position is further undercut by the fact that their consulting firm, whose model petitioners advocated before the EPA, refused to disclose full details of that model to EPA on grounds of "proprietary interest" (Pet. App. 26a). Petitioners cannot have it both ways. Unsatisfied with EPA's plan, and unwilling or unable to disclose their own, they cannot claim that the existence of their own plan demonstrates that the reviewing court failed to evaluate the EPA plan fully. The court of appeals fully discharged its responsibilities under *Overton Park.*

3. Petitioners Timken (Pet. 28-31) and Cleveland Electric Illuminating Company (No. 78-84, Pet. 15-16) contend that the court of appeals incorrectly decided the issue of EPA's responsibility under Section 110(c) to consider the economic and technological feasibility of a control plan. However, the court concluded that, assuming it had authority to consider such an argument, there was "ample support for the economic and technological feasibility" of the plan (Pet. App. 30a). The court did note, citing *Union Electric Co.* v. *EPA,* 427 U.S. 246, 261 n. 7, that there appears to be an open question whether EPA must consider feasibility when it promulgates a plan (Pet. App. 29a-30a). But, because EPA did evaluate in detail the feasibility of the plan,[6] and because the

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[6] The economic and technological findings made by the Administrator are summarized in EPA's *Final Technical Support Document* (August 1976) at V-1-83, and the *Supplemen-*

court determined that EPA's conclusion that the plan was feasible was amply supported, there is no need for this Court to address the issue here.

4. The utility petitioners (No. 78-84, Pet. 16-17) contend that the plan violates their due process rights by failing to set forth the technical means for determining compliance. They raised this argument for the first time in their reply brief before the Sixth Circuit, which did not discuss it. In any event, the objection is without merit. The plan does specify how compliance must be demonstrated—through stack emission tests—and that method has been included in the plan throughout the rulemaking. See 40 C.F.R. 52.1881 (b)(2)(iii) (No. 78-84, Pet. App. 133-134) and 40 C.F.R. 60.46 (No. 78-84, Pet. App. 217-218). In addition, subsequent to oral argument, EPA published a policy statement (43 Fed. Reg. 6646) (No. 78-84, Pet. App. 218-219) setting forth an alternative method for certifying compliance with the plan's emission

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tal Technical Support Document, supra, at 16-38. See also "Inflationary Impact Statement on Sulfur Oxide Regulations for Ohio," Volumes 1-11, Record Index IX.I.1-11; "Evaluation of the Technological Feasibility and Cost of Selected Control Alternatives Necessary to Meet Proposed Ohio SO_2 Regulations for Industrial Boilers and Processes," GCA-Technology Division, Nine Volumes, Record Index IX.D.1-21; and "Evaluation of the Technological Feasibility and Cost of Selected Control Alternatives Necessary for Power Plants to Meet the Proposed Ohio SO_2 Regulations," PEDCo Environmental Specialists, Fourteen Volumes, Record Index IX.E.1-14. In addition, many of these reports were revised in light of comments submitted during the remand period. Supplemental Record Index SV.J.1-8.

limitations. The alternative method was provided "to eliminate the necessity of conducting a stack test on every emitting source in Ohio." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1978.

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